

BASIC TREATY ISSUES IN MANCHURIA BETWEEN CHINA AND JAPAN

by

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INTRODUCTION

THE sudden flare-up of Sino-Japanese hostilities at Mukden on September 18, and the ensuing occupation of a large part of Manchuria by Japan's military forces, has again focussed world attention on the grave differences between China and Japan in this area.¹ Underlying the present clash is a basic set of conflicting national interests—economic, strategic and political. This conflict of Sino-Japanese interests in Manchuria has become increasingly acute within recent years by reason of the growing nationalist sentiment among the Chinese, as expressed particularly in the campaign for abrogation of the unequal treaties. Economic rivalries, especially those connected with the building of new railways, have grown keener, and have been exacerbated by an almost impossible political set-up. The attempt to reconcile Chinese sovereignty with the ill-defined jurisdictional rights exercised by Japan, in particular over the South Manchuria Railway and its attached areas, has been a source of never-ending controversy, leading directly to the present outbreak.

CHINA'S HISTORICAL CLAIM TO MANCHURIAN SOVEREIGNTY

The historical claim of China to sovereignty over Manchuria has been undisputed for nearly three hundred years, since the Manchu dynasty established itself on the throne of China in 1644. Within recent years, Chinese sovereignty in Manchuria has been explicitly recognized by the great powers. In reply to a question in the House of Commons on July 13, 1928, Sir Austen

Chamberlain declared that Great Britain considered Manchuria a part of China and recognized no special Japanese interests in it except those specifically conferred by treaty and outlined by Baron Shidehara at the Washington Conference.² On May 21, 1928 the American Secretary of State, Mr. Frank B. Kellogg, stated to the press: "As far as the United States is concerned, Manchuria is essentially Chinese soil."³ Chinese sovereignty over Manchuria is further buttressed by a population overwhelmingly Chinese—approximately 27,000,000 out of an estimated total of 29,000,000. After the lapse of a quarter-century of direct Japanese influence, only some 240,000 Japanese are residents of Manchuria, in addition to possibly 800,000 Koreans, who are considered Japanese subjects by the Japanese authorities.⁴

JAPAN'S ECONOMIC INTERESTS

On the basis of economic interests, the stake of Japan in Manchuria, as represented by its investments, is very substantial—far larger, indeed, than in China proper. In the case of its trade relations with China, however, the reverse is true, for the importance of Japanese trade with China proper greatly outweighs that with Manchuria. Present estimates place the approximate value of Japan's total investments in China (including Manchuria) at something over \$1,260,000,000.⁵ Japanese investments in Man-

2. *The Times* (London), July 14, 1928, p. 13.

3. *United States Daily*, May 22, 1928, p. 2.

4. *Second Report on Progress in Manchuria to 1930* (Dairen, The South Manchuria Railway, 1931), p. 12-13. Official Japanese figures placed the total Manchurian population for 1929 at 29,197,920, of which 90 per cent were Chinese. The alien population was given as 768,280 Koreans, 240,108 Japanese, 140,554 Russians, and 529 British, 384 Germans, 322 French, 290 Americans and 1,733 others.

5. George H. Blakeslee, "The Foreign Stake in China," *Foreign Affairs*, Vol. X, No. 1, October 1931, p. 83. Great Britain's investments in China are approximately equal to those of Japan (somewhat over \$1,260,000,000). Soviet Russia's are between \$200,000,000 and \$400,000,000, and those of the United States about \$250,000,000.

1. Manchuria, known to the Chinese as the Three Eastern Provinces, including Liaoning (formerly Fengtien), Kirin and Heilungkiang, embraces an area of some 382,000 square miles—approximately equal to the combined areas of Texas and New Mexico—and contains a population of some 29,000,000. In addition, the province of Jehol, which of late has been drawn increasingly within the orbit of Manchuria, has an estimated area of 60,000 square miles and a population of about 4,500,000.

churia itself aggregate nearly \$850,000,000, or approximately two-thirds of the total.⁶ In 1929 the total value of Japan's trade with China (including direct trade with Manchuria and Hong Kong) was approximately \$500,000,000, representing 24.4 per cent of its total world trade.⁷ Of this amount, Japanese trade with Manchuria accounted for slightly over \$125,000,000, or one-fourth of the total.⁸

These figures give some indication of the importance to Japan of its economic relationships with China, and more particularly with Manchuria. It should also be recognized that the rapid economic development of Manchuria during the past quarter-century owes much to the skill and enterprise of Japanese technicians and entrepreneurs. At the same time, however, the Chinese assert that their contribution to this development is equally, if not more, important. China has contributed, in the first place, the virgin resources of Manchuria, which is Chinese territory, and without which Japanese capital and skill would not have had scope for its activity. In the second place, the agricultural wealth of Manchuria today is largely the product of the millions of industrious Chinese settlers. The economic interests of China in Manchuria are especially vital in connection with the large-scale Chinese colonization movement proceeding from the densely populated areas of China proper during recent years.

THE BASIC TREATY ISSUES BETWEEN CHINA AND JAPAN

The political position of Japan in South Manchuria, rests chiefly on the Russo-Japanese Treaty of Portsmouth (September 5, 1905), by which Japan inherited the rights and interests previously held by Russia in South Manchuria, and on the Sino-Japanese Treaty and Agreements of Peking (December 22, 1905), providing for China's assent

6. *Second Report on Progress in Manchuria to 1930*, cited, p. 56. The amount given is ¥1,637,601,531. Japan's economic assets in Manchuria, in addition to the South Manchuria Railway itself, include collieries and iron works, harbor and wharf developments, municipal public utilities, factories and hotels, and loans of various kinds.

7. Blakeslee, "The Foreign Stake in China," cited, p. 88-89. United States' trade with China in 1929 totalled \$338,000,000; Great Britain's \$160,000,000.

8. *Second Report on Progress in Manchuria to 1930*, cited, p. 140. Japan accounted for ¥261,795,787 out of a total Manchurian trade of ¥755,255,340. From Manchuria Japan obtains raw materials, especially coal and iron, as well as foodstuffs and the soya-bean cake, used for fertilizer.

THE STRATEGIC INTERESTS OF CHINA AND JAPAN

The strategic interests of Japan in South Manchuria, which is regarded as the first line of Japanese defense against possible attack from the Asiatic mainland, are not less important than its economic interests. The plea of military necessity is strengthened by memories of the sacrifice of Japanese lives and treasure on the Manchurian plains during the Russo-Japanese war of 1904-1905, coupled with the emotional attachments to the Japanese monuments in South Manchuria. To China, however, the defense of Manchuria is equally vital, and the presence of Japanese troops in South Manchuria is a standing menace to its territorial integrity. It cannot accept the right of Japan to set up a first line of defense on Chinese soil.

The interaction of these economic and strategic conflicts has resulted in the establishment of an exceedingly complex political system in South Manchuria. Chinese sovereignty over this territory is recognized, but it is limited by a sweeping grant of jurisdictional rights to Japan in the Kwantung leased territory, and by a less well-defined, and often more questionable, administrative authority exercised by Japan over the South Manchuria Railway and its attached areas. This anomalous political alignment in South Manchuria has given rise to endless Sino-Japanese controversies, the great majority of which are still unsettled.

to the transfer of the Russian rights and interests to Japan. Certain of the more important rights thus acquired by Japan were later extended under the provisions of the Sino-Japanese Treaty and Notes of May 25, 1915, signed as a sequel to the Twenty-One Demands. It is with regard to these basic treaty agreements, especially those signed in 1915, that the most serious differences arise between China and Japan in Manchuria.

TREATIES OF PORTSMOUTH AND PEKING—1905

By the Treaty of Portsmouth, Japan acquired from Russia what are now called the

Kwantung leased territory and the South Manchuria Railway, together with all Russian rights and privileges connected therewith.' In view of later developments, it is important to note the period of time for which the Kwantung lease and the railway concession were effective. Under the original Sino-Russian agreements, the Kwantung territory was leased for twenty-five years from 1898, and was therefore recoverable by China in 1923. The concession for the Chinese Eastern Railway, of which the present South Manchuria Railway was the southern branch, was effective for eighty years after the completion of the railway, which occurred in 1903, and was therefore recoverable by China in 1983. A further clause, however, provided that China might recover the line by repurchase thirty-six years after its completion, i.e., in 1939.^{9a}

The consent of the Chinese government to the transfer of the former Russian rights and interests to Japan was secured in the Sino-Japanese treaty of December 22, 1905.¹⁰ An additional agreement of the same date also conceded to Japan the right to reconstruct and control the Mukden-Antung railway for a period of fifteen years from completion of the improvements.¹¹ At the end of this period—in 1923-1924—China might repurchase the line at a price to be determined by a foreign expert selected by both parties.¹²

TREATY AND NOTES BASED ON THE TWENTY-ONE DEMANDS

On May 25, 1915 a Sino-Japanese Treaty and Notes were signed at Peking, enforced by a Japanese ultimatum presented to China on May 7, 1915 as a sequel to the Twenty-One Demands.¹³ This treaty and its accompanying notes secured to Japan the more important of the five demands of Group II, relating to South Manchuria and Eastern Inner Mongolia. In particular, the terms of

the Kwantung lease and of the concession for the South Manchuria Railway and its Mukden-Antung branch were extended to ninety-nine years. The exchanges of notes specifically fixed the expiration date of the Kwantung lease at 1997, of the South Manchuria Railway at 2002, and of the Mukden-Antung line at 2007. The right of the Chinese government to repurchase the South Manchuria Railway in 1939 and the Mukden-Antung line in 1923-1924 was specifically revoked.

Legal Status

With regard to the legal status of the Sino-Japanese treaty and notes of 1915, it is held by Japan that their validity is established by the fact that neither the Chinese government, nor any third state, has ever officially declared them to be void and non-enforceable.¹⁴ The actual practice of the Chinese government, moreover, has been to accept them as valid and enforceable.¹⁵ The Chinese delegation at the Washington Conference presented arguments in support of a demand for the abrogation of the agreements, but did not declare them invalid.

Even though it may be argued that the Chinese government has of necessity temporarily accepted the 1915 agreements as valid and enforceable, it should be noted that the Chinese delegation to the Washington Conference specifically reserved China's right to seek a solution of the general question on all appropriate occasions in future. In pursuance of this policy, the Chinese government under date of March 10, 1923 transmitted a note to the Japanese government, declaring that with the approach of the expiry of the original term of the Kwantung lease "the Sino-Japanese Treaties and Notes of May 25, 1915 should forthwith be abrogated," and requesting that the Japanese government "appoint a day on which to dis-

9. John V. A. MacMurray, *Treaties and Agreements with and concerning China* (New York, Oxford University Press, 1921), Vol. I, p. 522-526.

9a. *Ibid.*, Vol. I, p. 74-77, 119-121.

10. *Ibid.*, Vol. I, p. 549-550.

11. *Ibid.*, Vol. I, p. 551-553.

12. Further stipulations of the additional agreement, especially those concerning the withdrawal of the railway guards, and certain alleged "secret protocols" to this treaty, of which the most important is one purporting to grant a Japanese veto over the construction of railways paralleling the South Manchuria Railway are taken up later. Cf. p. 392, 394.

13. MacMurray, *Treaties and Agreements with and concerning China*, cited, Vol. II, p. 1220-1237. These pages contain a text of the Twenty-One Demands. A second treaty, relating to Shantung, was also included in the 1915 agreements.

14. C. Walter Young, *The International Legal Status of the Kwantung Leased Territory* (Baltimore, Johns Hopkins Press, 1931), p. 153-167. It should be noted, however, that under date of May 13, 1915, twelve days before the agreements were actually signed, the United States government, in identical notes to China and Japan, declared that it could not "recognize any agreement or undertaking which has been entered into or which may be entered into between the governments of China or Japan impairing the treaty rights of the United States and its citizens in China, the political or territorial integrity of the Republic of China, or the international policy relative to China commonly known as the Open Door Policy." (MacMurray, *Treaties and Agreements with and concerning China*, cited, Vol. II, p. 1236.)

15. On this point, however, the Chinese argue that any attempt to void the agreements by unilateral action would provoke Japan to immediate war, so that the maintenance of the *status quo* still rests on Japan's superior military strength.

cuss questions incidental to the restoration of Port Arthur and Dairen or consequent upon the abrogation of the Treaties and Notes in question." In reply, the Japanese government declared that it found "absolutely nothing in the treaties and notes which is susceptible of further modification."¹⁶

Arguments Regarding Abrogation

Two basic arguments have been advanced by various writers, though not by the Chinese government officially, to show that China would be within its rights, on a strictly legal basis, in holding the Sino-Japanese agreements of 1915 invalid or voidable.¹⁷ First, it is argued that President Yuan Shih-k'ai exceeded his constitutional authority in signing these agreements without the consent of the Chinese Parliament, and that, in any case, a later Parliament specifically repudiated them. Second, it is urged that the use by Japan of *force majeure* to induce the compliance of Yuan Shih-k'ai constituted sufficient grounds for declaring the agreements so concluded invalid or voidable. With regard to the constitutional argument, however, official practice in 1915 differed very widely from the letter of the Constitution. President Yuan Shih-k'ai was, in fact, a practical dictator, who had amended the so-called Constitution out of existence with the support of an illegally constituted rump legislature. From the point of view of competence to deal with foreign states at this time, Yuan Shih-k'ai was himself the government. Moreover, several other treaties which were negotiated with foreign states during this period and never ratified by a Chinese parliament have been considered binding by the Chinese government. Under these circumstances, Japan argues that denunciation of the 1915 agreements by subsequent act of Parliament cannot be held to

have invalidated them, especially as the Chinese government has since exhibited in practice that it does not consider them void. With regard to the use of force, there is some question as to whether the Japanese ultimatum was not actually solicited by Yuan Shih-k'ai himself as a "face-saving" gesture. On the other hand, it is a fact that several thousand Japanese troops were moved to Dairen and Tsingtao at an early stage of the negotiations, ostensibly as replacements, but actually as reenforcements. In any case, from a juristic point of view, the weight of authority recognizes that the use of *force majeure* to induce the conclusion of an agreement is not sufficient to invalidate it.¹⁸

Political Aspects

Despite the strength of Japan's position from a legal standpoint, the Sino-Japanese treaty status in Manchuria is by no means a closed issue politically. From a political standpoint, the fact that the Twenty-One Demands were presented without provocation in time of peace, that force was utilized to secure their acceptance, and that the element of a *quid pro quo* was entirely lacking furnishes adequate grounds on which to rest China's demand at the Washington Conference for a reconsideration of the 1915 agreements. Further evidence of the Chinese government's determination to keep the issue open was afforded by its note presented to Japan under date of March 10, 1923, requesting abrogation of the 1915 agreements in view of the approaching expiry of the original Kwantung lease.¹⁹ It should also be noted that in securing the retrocession of the Kiaochow leasehold from Japan in 1923, as well as the British leasehold of Weihaiwei in 1930, precedents were established through which the Chinese government, by political means, may ultimately secure the return of other similar areas.

THE KWANTUNG LEASED TERRITORY

The Kwantung leased territory, called Kwantung Province by the Japanese, comprises the southern tip of the Liaotung Peninsula, including Port Arthur and Dairen and embracing an area of 1,337 square miles.

According to statistics compiled by the Kwantung government, there was on December 31, 1929 a total population of 883,778 in the leased territory, including 107,364 Japanese, 1,527 Koreans, 774,300 Chinese, and 587 others.²⁰

16. Young, *The International Legal Status of the Kwantung Leased Territory*, cited, p. 228-233.

17. *Ibid.*, p. 167-178.

18. The acceptance of such a principle of international law, as the Japanese delegation to the Washington Conference de-

The Japanese military administration of Kwantung Province, which followed the conclusion of the Russo-Japanese War of 1904-1905, was replaced on July 30, 1906 by a civil administration under a Governor-General who was a direct appointee of the Emperor, and who was at first required to be a general or lieutenant-general of the Japanese Army.²¹ Important changes in the governmental organization of Kwantung Province were made in the regulations promulgated April 12, 1919. The Governor-General was replaced by a civilian Governor, who exercises civil jurisdiction over the leased territory, controls the policing of the railway area, and exerts general supervision over the South Manchuria Railway Company. In administrative business he is subject to the Prime Minister; in international affairs, to the Foreign Minister. Military authority, however, is vested in the commander-in-chief of the Kwantung garrison, who therefore controls the railway guards, which are detachments of the regular garrison troops.

JURISDICTIONAL RIGHTS IN KWANTUNG

The civil and military jurisdiction originally exercised over the leased territory by Russia was all-embracing in character. The Sino-Russian lease convention specifically provided that the "entire military command of the land and naval forces and equally the supreme civil administration will be entirely given over to the Russian authorities."²² Minor exceptions, which were never actually enforced or which lapsed in practice, only confirm the practically exclusive and unlimited nature of this grant.²³ The Japanese

have succeeded to these rights in their entirety.

The full extent of Japan's jurisdictional authority in Kwantung Province is made evident by the status of Chinese and foreign residents. The Japanese authorities have always exercised complete judicial authority over Chinese residents, in both civil and criminal cases.²⁴ The same court system applies to Chinese and Japanese nationals, although at times Chinese usages have been observed in cases relating to such matters as the family, inheritance and bankruptcy. More significant still, the extraterritorial rights possessed by certain foreign nationals in China are not effective in Kwantung Province.²⁵ In the leased territory these nationals are subject to trial in the local Japanese courts, and also to the payment of such taxes as are levied by the local Japanese authorities. Furthermore, foreign consuls of third states at Dairen must receive recognition from the Kwantung government. Customs control is specifically conceded to Japan, and in practice the Kwantung government has exercised complete authority over the entry of nationals of third states into the leased territory. Finally, in time of war the province has been considered as much the territory of the lessee state as any integral portion of its domain. These facts demonstrate the unlimited nature of the jurisdictional rights legally held and actually exercised by Japan within Kwantung Province. The reservation of sovereignty by the Chinese government over the leased territory means nothing further than the ultimate legal right to recover the territory at the expiration of the lease.

THE SOUTH MANCHURIA RAILWAY

The situation with regard to the South Manchuria Railway Company, and the areas administered by it, is by no means as clear and specific, either *de jure* or *de facto*, as in regard to the Kwantung leased terri-

tory. The original Sino-Russian railway agreements governing the construction of the Chinese Eastern Railway, the extent of the area attached to it, and the nature of the jurisdictional authority exercised therein were so loosely drawn as to be capable

clared, would establish "an exceedingly dangerous precedent . . . with far-reaching consequences upon the stability of the existing international relations in Asia, in Europe and everywhere." (Conference on the Limitation of Armament, cited, p. 326.) To this statement the Chinese delegation replied that "a still more dangerous precedent will be established, with consequences upon the stability of international relations which cannot be estimated, if, without rebuke or protest from other Powers, one nation can obtain from a friendly, but, in a military sense, weaker neighbor, and under circumstances such as attended the negotiation and signing of the Treaties of 1915, valuable concessions which were not in satisfaction of pending controversies and for which no *quid pro quo* was offered." (*Ibid.*, p. 1556.)

19. Cf. p. 383-384.

20. *Second Report on Progress in Manchuria to 1930*, cited, p. 84.

21. *Ibid.*, p. 85-86; also MacMurray, *Treaties and Agreements with and concerning China*, cited, Vol. I, p. 565-573.

22. MacMurray, *Treaties and Agreements with and concerning China*, cited, Vol. I, p. 120.

23. Young, *The International Legal Status of the Kwantung Leased Territory*, cited, p. 18-49.

24. *Ibid.*, p. 60-66.

25. *Ibid.*, p. 74-96.

of widely differing interpretations in certain essential aspects. In the period preceding the Russo-Japanese war a number of important clauses were interpreted unilaterally by Russia, to the disadvantage of China. Difficulties thus arising were perpetuated when the southern extension of the Chinese Eastern Railway, i.e., the South Manchuria Railway, was transferred to Japan in 1905, and a new set of problems was created by the Sino-Japanese agreements then contracted. The natural result has been a series of controversies, many of which originated in the early Russian days, while others have arisen since; none, however, has ever been finally settled.

NATURE AND ORGANIZATION OF THE RAILWAY COMPANY

The South Manchuria Railway Company is a complex organization performing a variety of functions, some of a private and others of a public nature.²⁶ In one of its aspects it is a private joint stock company, organized under Japanese law for the purpose of engaging in private commercial enterprises. While its chief commercial function is that of railway management, it also supervises collieries and iron and steel works, participates in the control of an express company and a steamship line, manages the construction and operation of hotels, and engages in loan enterprises. Its debentures are sold in London and Tokyo, and it enters into private contracts with individuals, corporations and governments. At the same time, the South Manchuria Railway Company engages in public enterprises of the type frequently administered by municipal corporations. Within the railway areas it is responsible for the development and administration of public utilities, such as water transportation systems, municipal transit lines and electrical enterprises. It is also engaged in sanitation and health work, education, and scientific experimentation in agriculture and industry, in all of which it has been particularly successful. The company further exercises broad powers of civil administration, such as authority to collect taxes and to establish local governments in the railway areas, although police and judi-

cial functions are reserved to the Kwantung government.

Political Character of the Railway Company

The South Manchuria Railway Company, apart from the differentiation of its private and public functions, is also political in character, with the controlling influence reserved to the Japanese government.²⁷ It was created by the Japanese government at an initial capitalization of ¥200,000,000, divided into 1,000,000 shares; subscription was limited to the governments of Japan and China and their subjects.²⁸ The acquired railway and mining rights of the Japanese government in South Manchuria were transferred to the company in exchange for half the initial capital stock—500,000 shares with a value of ¥100,000,000. The Japanese government guaranteed a 6 per cent dividend on these shares for a period of fifteen years, as well as interest payments, under specified conditions, on the company's debentures.²⁹ In 1920 the original authorized capital of ¥200,000,000 was increased to its present total of ¥440,000,000, with the Japanese government still owning one-half. Since each share permits the holder to cast one vote in a directors' meeting, the government is in full control of the company. Further provisions make this control still more complete. The president, vice president, and directors are all appointed by the government—the latter from shareholders owning fifty or more shares. In practice, the president is appointed by the Prime Minister, and although his term was fixed at five years, few have ever served the full term, being replaced at each incoming administration. The government must approve changes in the company regulations, the annual budget estimates, the floating of debentures, alterations in freight rates, new construction or development projects, and the disposal or pledging of the company's chief rights and properties. Finally, the company is obligated to place its railways, land, and other assets at the government's service whenever

27. MacMurray, *Treaties and Agreements with and concerning China*, cited, Vol. I, p. 555-565.

28. The Chinese government did not subscribe to any of the stock, and the number of private Chinese citizens who have done so is negligible.

29. Up to 1912 debentures to the amount of £14,000,000 had been supplied by British financiers; in 1923 a fifth loan, of £4,000,000, was obtained in London. Other debentures were floated in Tokyo.

26. C. Walter Young, *Japanese Jurisdiction in the South Manchuria Railway Areas* (Baltimore, Johns Hopkins Press, 1931), p. 76-101; also *idem.*, *The International Relations of Manchuria* (University of Chicago Press, 1929), p. 61-64.

the latter wills. The South Manchuria Railway Company is therefore a semi-official institution, created by and responsible to the Japanese government, and subject to amendment or abolition as the government sees fit.

THE SOUTH MANCHURIA RAILWAY AREAS

The two main lines of the South Manchuria Railway are the Dairen-Changchun line (438.5 miles) and the Mukden-Antung line (161.7 miles). Branches run to Port Arthur, Yingkou, Yentai and Fushun. The total length of the railway, including the two main lines and the branches, is 690.8 miles.³⁰

Much of the difficulty of appraising the legal validity of the jurisdictional rights exercised by the Japanese in the South Manchuria Railway areas arises from basic disputes over the geographical limits of the areas themselves.³¹ The commonly used term "railway zone" is not descriptive of the areas actually administered by the South Manchuria Railway Company, nor does it appear in any international document as an area specifically delimited by mutual agreement between China and Japan. The right-of-way along the railway is not uniform, varying so irregularly from fifty to three hundred feet in width as to defy accurate representation on any ordinary map. Moreover, the important Japanese administrative areas are not the right-of-way itself, but large blocks of land acquired by various means in a dozen or fifteen of the more important cities along the railway. The largest of these areas are at Fushun, with its collieries; Anshan, where important iron works are located; and Mukden, which includes an extensive Japanese-controlled municipal area. The various Japanese railway areas in South Manchuria, by official Japanese estimate, cover some 108 square miles.

The application of the term "railway zone" to the lands either possessed or administered by the South Manchuria Railway Company is also misleading because it creates the impression of a special area, the

legal character of which is derivable from a single agreement or a uniform set of agreements. Actually, however, the legal status of these areas is derived from six different types of land titles, as determined by the mode of acquisition. They include (1) lands acquired from Russia by virtue of the transfer effected under the Russo-Japanese and Sino-Japanese treaties of 1905; (2) lands appropriated or purchased from local Chinese owners by the Japanese military during and after the Russo-Japanese war; (3) lands acquired on long-term lease from local Chinese owners under the terms of Article 6 of the Sino-Russian railway contract of 1896; (4) lands acquired under local arrangements with Chinese owners on thirty-year leases either before or after 1915, when this procedure was legalized; (5) lands acquired on perpetual lease in the "open ports," as in Mukden, Antung and Yingkou; and (6) lands acquired by private Japanese subjects, often on perpetual lease, as in Yingkou and Antung, and turned over to the administration of the South Manchuria Railway Company. These distinctions in land titles demonstrate the non-uniform character of the legal bases for the exercise of Japanese jurisdictional rights in the various railway areas. More especially, however, they give concrete form to the vital problem of the legal bases for the enlargement of the South Manchuria Railway areas.

ENLARGEMENT OF THE RAILWAY AREAS

The fact that the South Manchuria Railway Company's lands do not constitute a permanently fixed area, but are subject to enlargement, further demonstrates the inaccuracy of the term "railway zone." These special railway areas have been slowly but steadily increasing in size since 1905. Whereas the total area of the lands directly acquired from Russia by Japan at that time has been estimated at 65 square miles, the area now possessed by the railway authorities totals 108 square miles. The Chinese assert that the basic legal authority for the acquisition of areas so extensive is very slight. The original Sino-Russian railway agreement of 1896 specified that only such lands as were "actually necessary for the

30. *Second Report on Progress in Manchuria to 1930*, cited, p. 108.

31. This section and those immediately following are condensed from Young, *Japanese Jurisdiction in the South Manchuria Railway Areas*, cited, p. 134-315.

construction, operation, and protection of the line, as also the lands in the vicinity of the line necessary for procuring sand, stone, lime, etc." could be acquired by the railway authorities. The article continues by stating that such lands "will be turned over to the Company freely, if these lands are the property of the State; if they belong to individuals, they will be turned over to the Company either upon a single payment or upon an annual rental to the proprietors, at current prices."³² No difficulty seems to have arisen over the acquirement by Russia, on the basis of this article, of the legal title to lands actually required for the railway's right-of-way. The attempts of Russia and, later, of Japan, however, to acquire large additional areas which, China asserted, were not "actually necessary for the construction, operation, and protection of the line" have led to fundamental controversy over the legality of the titles to such areas. Such controversy has been waged over the legal validity of the Japanese titles both to the lands transferred to Japan immediately after the Russo-Japanese war and also to the lands since acquired by the Japanese railway authorities.

Acquisitions During and After the Russo-Japanese War

The pre-war surveys of the areas acquired by Japan in 1905 had not been definitive; certain lands included therein had been acquired by Russia through illegal means, and cases at once arose of Chinese claimants to ownership of such lands. Similar difficulties arose over the mining lands transferred to Japan, particularly those at Fushun, where questionable land titles gave rise to controversy only partially settled through bilateral Sino-Japanese agreements in 1909 and 1911. Further conflict was caused by lands taken over for "military use" during or immediately after the Russo-Japanese war by the Japanese military. While such seizures may have been justified or full compensation rendered in some cases, in other cases this action is judged by a recent investigator to have been "entirely unreasonable and without compensation."³³ The lack of an im-

partial tribunal before which the Chinese could bring suit to protect their interests has prevented definitive settlement of disputes of this nature.

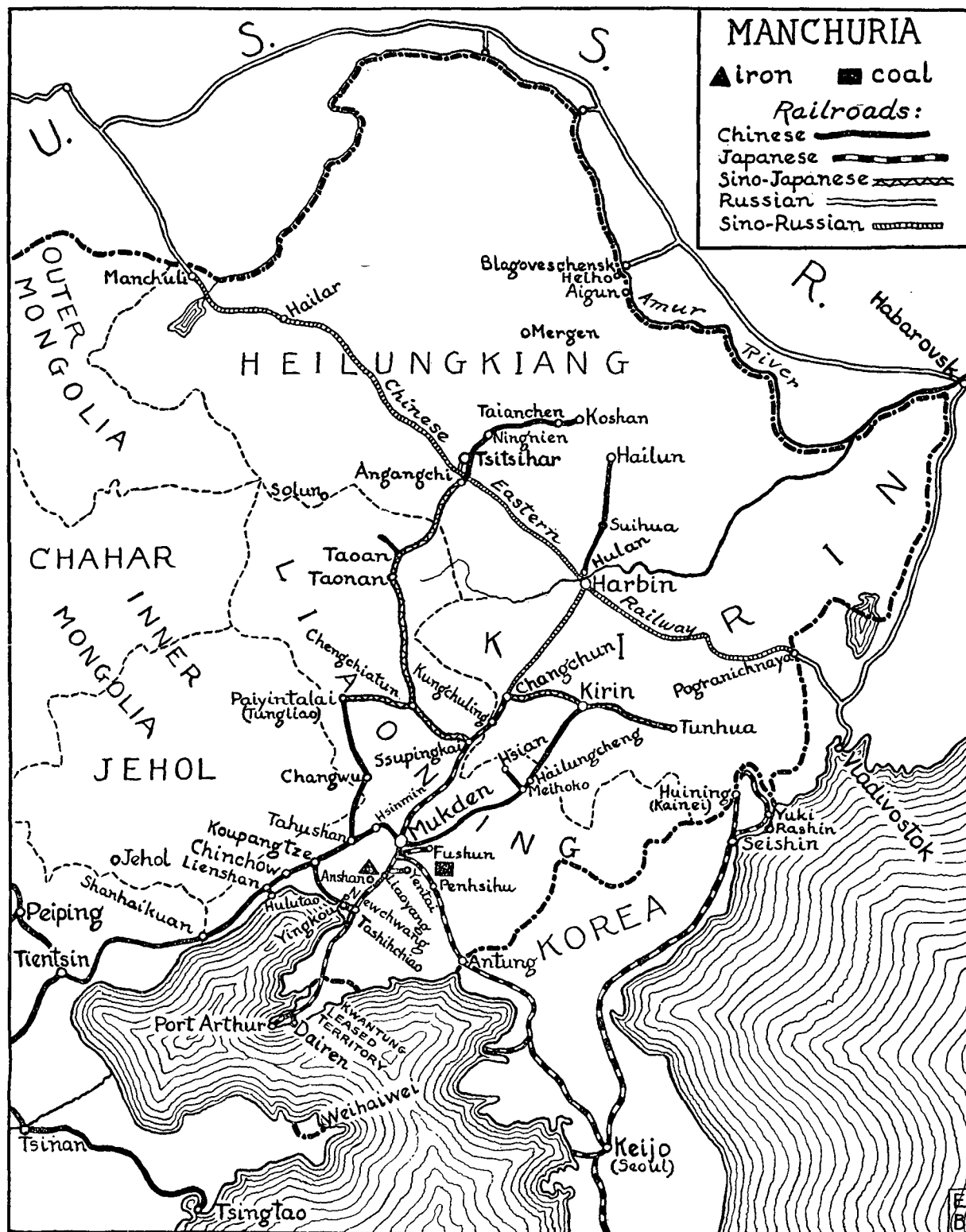
Since the Russo-Japanese war, the largest additional areas acquired by the South Manchuria Railway Company have been those which are included in the railway municipalities and the right-of-way along the Mukden-Antung line. The regulations accompanying the Sino-Japanese agreement of August 19, 1909, whereby China finally confirmed the previously acquired Japanese right to reconstruct the Mukden-Antung line, were sufficiently detailed to enable Japan to secure adequate title deeds, either by purchase or lease, to all lands required for railway purposes. The large additional areas incorporated in the Japanese railway municipalities along the Mukden-Antung line, however, and especially at Antung, are asserted by China to have been acquired, in part at least, by unjustified military confiscation.

Further areas have been acquired from Chinese owners by private Japanese nationals on long-term or perpetual leases, and then transferred to the administration of the railway authorities. Article 2 of the Treaty of May 25, 1915 permitted Japanese subjects in South Manchuria "by negotiation" to "lease land necessary for erecting suitable buildings for trade and manufacture or for prosecuting agricultural enterprises" — a right which other foreign nationals do not possess outside treaty ports.³⁴ The Japanese claim that this right to lease land in South Manchuria has been persistently undermined by instructions issued to the local Chinese authorities by the Mukden and Kirin provincial governments. In many cases, nevertheless, the Chinese officials have permitted the negotiation of such leases, or even at times the acquisition of titles in freehold, the deeds of which are properly registered and filed in the local courthouses. The South Manchuria Railway Company, in its character as a private corporation, has itself been enabled to acquire additional lands on such long-term leases. Finally, lands have also been acquired by private Japanese nationals on perpetual lease in the "open ports," where

32. MacMurray, *Treaties and Agreements with and concerning China*, cited, Vol. I, p. 76.

33. Young, *Japanese Jurisdiction in the South Manchuria Railway Areas*, cited, p. 151.

34. MacMurray, *Treaties and Agreements with and concerning China*, cited, Vol. II, p. 1220.



THE MANCHURIAN RAILWAY SYSTEM

such action is permitted by special agreements. Lands thus acquired will remain in the permanent possession of the private Japanese owners unless the agreements governing them are altered, and therefore must be distinguished from the railway lands proper, which are subject to reversion to China in the year 2002, in accordance with the 1915 agreements.

Lands acquired by all these various methods are concentrated under the control of the South Manchuria Railway authorities in the Japanese-administered municipalities at Mukden, Fushun, Antung, Yingkou and some dozen other major areas. In the case of the great majority of the controversies with regard to land titles, however, as well as the basic legal validity for the acquisition of such large areas, long acquiescence by the Chinese authorities in the *de facto* situations which have grown up is claimed by Japan as in itself sufficient to preclude the possibility of reconsideration on strictly legal grounds.

ADMINISTRATIVE RIGHTS IN THE RAILWAY AREAS

The extent and validity of Japanese jurisdictional authority over these railway municipalities has given rise to even greater controversy than that concerning the methods and treaty authority by which the lands composing them have been acquired. Such jurisdictional conflicts usually have revolved around the extent of Japanese administrative authority in the spheres of taxation, law and police protection.

The basic treaty provision on which Japan rests its right to exercise administrative authority within the railway areas occurs in the Sino-Russian railway agreement of 1896,³⁵ in the French text of which it is stipulated that: "The Company will have the absolute and exclusive right of administration of its lands."³⁶ Although this clause occurs only in the French text, there is good reason for the belief that the Chinese authorities were aware of its existence. The fact that it was concealed for twelve years—until 1908—is evidence, moreover, that its poli-

tical connotations were recognized. On the other hand, the Chinese claim that the clause, when interpreted in the light of the agreement as a whole, does not sanction an unlimited political administration over the extensive railway areas that have since been acquired by the Japanese authorities in South Manchuria. The statement does not stand alone; on the contrary, it is embedded in Article 6 which delimits the railway areas to the "lands actually necessary for the construction, operation, and protection of the line." Furthermore, no detailed grants of jurisdictional rights are made in other articles which could be interpreted as supporting a grant of blanket administrative authority to the railway officials. Instead, Article 5 specifically asserts that the Chinese government "will take measures to assure the safety of the railway and of the persons in its service against any attack," and that "criminal cases, lawsuits, etc., upon the territory of the railway, must be settled by the local authorities in accordance with the stipulations of the [extraterritoriality] treaties."³⁷ Moreover, Article 8 provided that Russian troops were not to be stationed along the railway on any pretext whatsoever. On these grounds, therefore, the Chinese argue that the clause in question conferred but a limited political grant to Japan within the areas immediately connected with the railway, subject to specific reservations to Chinese administrative authority. Nevertheless, the Japanese have exercised practically unlimited administrative authority within the railway areas.

Taxation

The Japanese authorities in the railway areas habitually levy and collect taxes from both Chinese and foreigners. The right to exercise this authority is claimed by the Japanese on two grounds.³⁸ In the first place, it is asserted that such a right is derivable from the general grant of administrative authority implied in Article 6 of the Sino-Russian railway agreement of 1896. This agreement, it should be noted, neither confers nor withholds, in so many words, the authority to tax. The Chinese assert, how-

35. Cf. discussion in Young, *Japanese Jurisdiction in the South Manchuria Railway Areas*, cited, p. 1-32.

36. MacMurray, *Treaties and Agreements with and concerning China*, cited, Vol. I, p. 76. The French text reads: "La Société aura le droit absolu et exclusif de l'administration de ses terrains."

37. *Ibid.*, Vol. I, p. 76.

38. Young, *Japanese Jurisdiction in the South Manchuria Railway Areas*, cited, p. 222-245.

ever, that it is highly doubtful whether, in the light of the whole agreement, the general grant of Article 6 could be interpreted so as to authorize the taxation of a resident population within the South Manchuria Railway areas estimated on December 31, 1929 at 342,043, of whom 230,507 were Chinese, 95,658 Japanese, 13,941 Koreans, and 1,937 foreigners.³⁹ In the second place, it is held by Japan that the principle of equity imposes upon foreigners and Chinese residing in the railway areas the moral obligation to contribute taxes to the Japanese administration in return for services received, such as police protection, highway maintenance, public utilities, and the general benefits accruing from an ordered administration.

It is apparently on this second basis that the foreigners resident in the South Manchuria Railway areas have submitted to the payment of the taxes levied by the Japanese authorities. The United States government, however, has never officially admitted the legal validity of the right of the Japanese authorities to levy and collect such taxes from American nationals residing in the railway areas. This issue has never been raised in its acute form and definitively settled through legal action taken by Japan in the consular courts of a foreign national to compel the collection of taxes. Where cases in which foreigners refused to pay taxes have arisen, they have been settled out of court by mutual agreement between the foreigners concerned and the local Japanese authorities.

A somewhat similar situation exists with regard to the payment of taxes by Chinese residents of the railway areas. Although the Chinese government has never officially admitted the validity of the tax authority exerted by the Japanese officials over Chinese nationals within the railway areas, it has acquiesced in the *de facto* situation, and controversies have been settled out of court. A more difficult phase of this problem, however, concerns the persistent efforts of Chinese authorities to collect taxes from their nationals residing in these areas. This issue has been bitterly contested for twenty-five years by the local Chinese and Japanese

authorities—often with accompanying threat of force—and is still unsettled.

So long as there is, apparently, official Chinese acquiescence in Japanese possession of the South Manchuria railway areas, the right of the Japanese authorities to levy taxes therein may be justified on grounds of equity, and will certainly be insisted upon, whatever may be its technical validity. The basic issue, therefore, is not the right to tax, but whether the Japanese shall continue to hold extensive areas not essential for the use of the South Manchuria Railway as an artery of communication.

Judicial Authority

The South Manchuria Railway areas, so far as judicial matters are concerned, are not to be differentiated from other parts of China.⁴⁰ Consequently, Chinese residents of the railway areas are subject to trial before the Japanese courts only in cases where Japanese are the defendants in a civil suit or the accused in a criminal suit. Other cases are clearly within the jurisdiction of the Chinese courts, although the practice of the Japanese authorities does not always accord with this legal right. Moreover, the fact that a Chinese must take suit against a Japanese in a Japanese consular court renders it difficult for him to obtain redress in cases where he is the aggrieved party.

Foreign nationals of third states having extraterritorial treaties with China, even though residents of the railway areas, are subject to the jurisdiction of their consular authorities. The United States government has insisted officially that the extraterritorial rights of American nationals are effective within the railway areas. Furthermore, no other third state has ever waived extraterritorial jurisdiction over its nationals in these areas. At the same time, the Japanese government has maintained officially that the judicial authority exercised by its officials within the railway areas is derivable from Japan's extraterritorial treaties with China. In actual practice, moreover, the Japanese judicial machinery in Manchuria, though subordinate to the Kwantung government for purposes of appeal, is exclusively in the hands of the Japanese consular authorities.

39. *Second Report on Progress in Manchuria to 1930*, cited, p. 84.

40. Young, *Japanese Jurisdiction in the South Manchuria Railway Areas*, cited, p. 246-260.

The Chinese therefore argue that this is a clear situation which refutes Japan's claim that the South Manchuria Railway areas are subject to the "absolute and exclusive administration" of the railway authorities. Since Japanese judicial authority rests on the provisions of the extraterritorial treaties, the successful negotiation of a new Sino-Japanese treaty providing for the abolition of extraterritoriality would establish an entirely new judicial régime in the railway areas. Unless at that time Japan fell back on the much mooted general grant of administrative authority claimed to have been conferred by Article 6 of the Sino-Russian railway agreement of 1896, the Chinese authorities would be at liberty to establish a system of Chinese courts within the railway areas to which all foreigners, including the Japanese, would be subject.

The Railway Guards

The Japanese railway guards are, in fact, regular Japanese soldiers, numbering on occasion between 12,000 and 15,000, but usually less, stationed at various points along the South Manchuria Railway, chiefly at Changchun, Kungchuling and Liaoyang.⁴¹ This force has no separate and independent status of its own, but forms part of the Kwantung Garrison,⁴² under authority of the garrison commandant, who is appointed by and responsible to the Minister of War and the Chief of the General Staff. Although he is authorized to comply with the Kwantung Governor's requests for the dispatch of troops required to preserve peace and order in the leased territory and the railway areas, the garrison commandant may, if his military superiors so desire, take independent action.⁴³

The original Sino-Russian railway agreements contain no provision which would sanction the establishment of a system of railway guards such as is now maintained by

Japan. The basic agreement of 1896 reserved to China the right to protect the railway from external attack, and clearly prohibited the stationing of Russian troops along the line.⁴⁴ Article 6 merely authorized Russia to acquire lands necessary for the construction, operation, and "protection" of the line, a provision which by implication might have sanctioned at most the establishment by Russia of a civilian police force. The introduction by Russia of a system of railway guards — actually Russian troops — seems therefore to have been a violation of the Sino-Russian agreement. Strenuous efforts made by the Russian government to gain explicit sanction for the arbitrarily established system of Russian railway guards were stubbornly and successfully resisted by the Chinese authorities.

By the Treaty of Portsmouth at the end of the Russo-Japanese war, Russia and Japan agreed to limit their railway guards to fifteen men per kilometer, but this agreement did not become binding upon China until ratified by the Sino-Japanese "additional agreement" of December 22, 1905. The article whereby China supposedly confirmed this right, and which is the source of the official Japanese claim of a treaty basis for stationing railway guards in the railway areas, reads as follows:⁴⁵

"In view of the earnest desire expressed by the Imperial Chinese Government to have the Japanese and Russian troops and railway guards in Manchuria withdrawn as soon as possible, and in order to meet this desire, the Imperial Japanese Government, in the event of Russia agreeing to the withdrawal of her railway guards, or in case other proper measures are agreed to between China and Russia, consent to take similar steps accordingly. When tranquillity shall have been reestablished in Manchuria and China shall have become herself capable of affording full protection to the lives and property of foreigners, Japan will withdraw her railway guards simultaneously with Russia."

The Chinese assert that the purpose of this article was to secure the speedy withdrawal

41. *Ibid.*, p. 261-291, 300-315.

42. The Kwantung Garrison is, of course, unlimited by treaty, and may be as large as military policy dictates, so long as it keeps within the confines of the leased territory. The railway guards, on the other hand, are limited by treaty to 15 men per kilometer, and therefore should not exceed some 15,000 men.

43. In this connection, Dr. C. Walter Young writes: "The well-known independence of the military from the Premier or the Foreign Office established by long practice and made particularly possible due to the constitutional right of direct appeal of the military to the Throne, has had the effect of making the railway guards in South Manchuria an instrument of a military clique in Tokyo, acting through the commander-in-chief of the Kwantung Garrison." (Young, *Japanese Jurisdiction in the South Manchuria Railway Areas*, cited, p. 290-291.)

44. MacMurray, *Treaties and Agreements with and concerning China*, cited, Vol. I, p. 74-77. The relevant provisions read as follows: "The Chinese Government will take measures to assure the safety of the railway and of the persons in its service against any attack" (Article 5); and "The Company is responsible that the Russian troops and war material, despatched in transit over the line, will be carried through directly from one Russian station to another, without for any pretext stopping on the way longer than is strictly necessary" (Article 8).

45. MacMurray, *Treaties and Agreements with and concerning China*, cited, Vol. I, p. 551.

of the railway guards which had first been arbitrarily introduced into Manchuria by Russia. Nevertheless, the Japanese railway guards are still maintained after the lapse of twenty-five years. In the meantime, the withdrawal of the Russian railway guards along the Chinese Eastern Railway has been accomplished—by compulsion in 1917 and by mutual agreement since 1924. Japan, however, claims that the right to maintain its railway guards still exists, based on the condition which it regards as not yet fulfilled—namely, provision by China of “full protection to the lives and property of foreigners.” China denies the validity of this claim, and asserts its willingness and ability to protect foreign interests.

Municipal and Consular Police

In addition to the regular Japanese garrison troops in the Kwantung leased territory, from which the railway guards are drawn, two further police authorities under Japanese control exist in South Manchuria.⁴⁶ These are the municipal police in the railway towns, and the consular police attached to the Japanese consulates. Though these forces should be clearly distinguished from each other as regards their legal status, it should be noted that all four agencies are interlocked, and for practical purposes at one time or another may be interchanged.

The civilian police forces established by

the Japanese in the railway municipalities in South Manchuria are controlled not by the railway authorities but by the Governor of Kwantung. These forces, as of March 31, 1930, were estimated to number approximately 3,000 officers and men, including 766 Chinese policemen in the Japanese service.⁴⁷ The legal right to establish these municipal police is evidently derived by Japan from the general grant of administrative authority expressed in the French text of the original Sino-Russian railway agreement of 1896.

The Japanese government also maintains consular police forces at all its various consulates-general, consulates, and branches in Manchuria. These police are stationed not only within the railway areas, but also at consular stations outside such areas in both South and North Manchuria. The organization of the Japanese administrative system in South Manchuria enables the Japanese consulates to draw upon the railway guards to re-enforce the consular police in periods of disorder, which has led to the utilization of the railway guards in places entirely outside and remote from the railway areas. The Chinese government has officially contested Japan's right to maintain these consular police, especially in the negotiations concerning the so-called “Chengchiatun Incident” in 1916, but to no avail. No other foreign governments in China claim this right.

CHINESE RAILWAYS IN MANCHURIA

The issues arising from the Chinese-controlled railways in Manchuria, which now comprise a greater mileage than the South Manchuria Railway, have become steadily more urgent within recent years.⁴⁸ Two main railway systems, the Changchun-Tunhua line, extending eastward from Changchun toward the Korean border, and the Ssuning-kai-Angangchi line, running from north of Mukden toward Tsitsihar in North Manchuria, have been constructed through joint Sino-Japanese cooperation. These lines are important as feeders of the South Manchuria Railway, and, like the latter, are of standard gauge, in distinction to the broad gauge of the Chinese Eastern Railway. They have

been built largely of Japanese railway materials and with the aid of Japanese technicians. In addition, their construction has been financed by Japanese capital in the form of loans (now mostly in arrears) placed on the roads. Except for the section from Changchun to Kirin, however, these lines are legally Chinese government railways, and are operated and controlled by the Chinese authorities.

Since 1925 an entirely new set of problems has been created by the independent construction on the part of the Chinese authorities at Mukden of a group of Chinese-controlled railways financed by Chinese capital, of which the most important are

46. Young, *Japanese Jurisdiction in the South Manchuria Railway Areas*, cited, p. 291-299.

47. *Ibid.*, p. 291-292.

48. This problem of Sino-Japanese railway competition in Manchuria will be treated in detail in a forthcoming *Foreign Policy Report*.

the Kirin-Mukden and Tahushan-Paiyintalai lines. The basic right of the Chinese to construct these railways has been challenged by Japan on the score of certain alleged "secret protocols" to the Sino-Japanese treaty of 1905, one provision of which, it is claimed, forbids the construction by China of lines "in the neighborhood of and parallel to" the South Manchuria Railway. The fact that no official texts of these alleged protocols has ever been published, however, casts doubt on their authenticity. An additional grievance of Japan's with regard to the Chinese-built railways is that the orders for construction materials have gone largely to Western countries, chiefly the United States, instead of to Japan. Moreover, the railway rates effective on both the Chinese and the Sino-Japanese lines are charged in a depreciated silver currency, thus undercutting Japanese

rates on the South Manchuria Railway which have been charged on the basis of a gold-standard yen." Such competition is particularly irksome to Japan in view of the failure of the Chinese to maintain payments on the Japanese loans which financed the building of the Sino-Japanese railways. The Chinese authorities at Mukden also have under way the construction of a new Chinese port at Hulutao, designed to furnish an outlet for Manchurian products along the Chinese railways in competition with Dairen. The possibility held out by these developments of an eventual unified group of Manchurian railways under Chinese management, which will be in a position to strangle the South Manchuria Railway economically, has raised an altogether new issue of outstanding importance.

CONCLUSION

The complicated nature of the conflicting Sino-Japanese rights and interests in Manchuria is sufficiently indicated by the summary treatment of the foregoing pages. In the final analysis, however, the conflict narrows down to a single paramount issue. Over a period of twenty-five years, on a basis of special political privileges, Japanese enterprise has built up an economic structure in Manchuria of vital import to Japan. In view of the weakness of Chinese governmental administration, with the consequent lawlessness and banditry, it is claimed that a continuance of Japan's political rights is essential to guarantee the unhampered pursuit of its economic activities. China, on the other hand, claims that it is willing and able to guarantee legitimate Japanese business enterprise in Manchuria, but refuses to admit the necessity of such enterprise continuing on the basis of special political privileges wrung from China by force.

A solution to this problem, if it is to be at all permanent, must include three primary elements: the stabilizing of the Chinese government; security for legitimate Japanese economic interests; and a settlement of the treaty issue, equitable to China as well as to Japan. A comprehensive settlement

along these lines cannot be reached immediately, nor, possibly, even in the near future. It can be achieved only when responsible civilian leaders come into authority, both in Japan and China, convinced of the necessity of genuine Sino-Japanese cooperation.

Meanwhile, however, it is necessary to attempt to institute such changes as will tend to remove existing causes of friction and so minimize the possibility of further conflict. Some of the more pressing issues of this nature, in which immediate progress might be made, have been indicated. These include the institution of impartial courts of justice for the trial of mixed cases arising within or on the borders of the railway areas, stricter delimitation of the areas within which the Japanese railway guards should function, curtailment of the activities of the Japanese consular police, limitation of the process whereby lands leased to Japanese nationals are added to the Japanese-administered railway areas, provision for repayment of the Japanese railway loans, and the setting-up of a joint Sino-Japanese body to reach agreements on new railway projects and to prevent ruinous railway competition. It is along these lines that the report of the League commission of inquiry—provided for on December 10—with its advantages of first-hand investigation, should prove of the utmost value.

49. This factor operated until the middle of December, when Japan imposed an embargo on gold shipments, thus going off the gold standard. (*New York Times*, December 14, 1931.)